UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION



WILLIAM CROSKEY,

Plaintiff,

CASE NO. 02-CV-73747-DT
JUDGE NANCY G. EDMUNDS
MAGISTRATE JUDGE PAUL J. KOMIVES

v.

BMW OF NORTH AMERICA, INC. and BAYERISCHE MOTOREN WERK AKTIENGESELLSCHAFT (BMW AG),

Defendants.
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**MEMORANDUM OPINION AND ORDER DEEMING MOOT IN PART, GRANTING IN PART AND DENYING IN PART BMW'S EMERGENCY MOTION TO STAY THE JANUARY 10, 2005 *DE BENE ESSE* DEPOSITION OF DR. CHARLES KEOLEIAN AND PERMIT BMW'S COUNSEL TO MEET *EX PARTE* WITH PLAINTIFF'S TREATING PHYSICIANS (Doc. Ent. 87)**

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## I. OPINION

### A. Introduction

In this case, plaintiff seeks damages for injuries resulting from an alleged July 2001 radiator explosion in plaintiff's 1992 BMW 325. On January 6, 2005, BMW filed an emergency motion seeking to (1) stay the January 10, 2005 *de bene esse* deposition of plaintiff's treating physician, Dr. Charles Keoleian, and (2) permit BMW's counsel to meet ex parte "with all of [p]laintiff's treating physicians and health care providers." (Doc. Ent. 87 [Mtn.] at 1-2).[1]

On January 21, 2005, plaintiff filed a response. (Doc. Ent. 106 [Rsp.]). BMW filed a reply on February 1, 2005. (Doc. Ent. 116 [Rpl.]).

### B. Health Insurance Portability and Accountability Act of 1996 (HIPAA)

In 1996, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936, was enacted. "The principal purpose of HIPAA and the 2003 amendment is to safeguard individually identifiable health information[.]" *United States ex rel. Pogue v. Diabetes Treatment Centers of America*, No. Civ.99-3298, 01-MS-50(MDL)(RCL), 2004 WL 2009416, *5 (D.D.C. May 17, 2004). "Health information includes 'any information, whether oral or recorded in any form or medium, that: (1) is created or received by a health care provider ...; and (2) relates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment

[1]On January 6, 2005, Judge Edmunds referred this motion to me for hearing and determination. On January 10, 2005, I entered a scheduling order requiring any response to be filed by Monday, January 24, 2005, and any reply to be filed in accordance with E. D. Mich. LR 7.1(d)(2)(C). Furthermore, I stated that the motion would be decided on the papers.

for the provision of health care to an individual.'" *Law v. Zuckerman*, 307 F.Supp.2d 705, 708 (D. Md. 2004) (quoting 45 C.F.R. § 160.103). *See also* 42 U.S.C. § 1320d(4).

**C. Analysis**

**1. BMW's motion is deemed moot to the extent it seeks a stay of the January 10, 2005 deposition.** [2]

First, January 10, 2005, has passed. Second, in a January 6, 2005, e-mail to my law clerk, plaintiff's counsel represented that he would be adjourning Dr. Keoleian's January 10, 2005, deposition. Third, plaintiff's January 21, 2005, response confirms that "Dr. Keoleian's de bene esse deposition has been cancelled." Rsp. ¶ 18. Therefore, BMW's motion is deemed moot to the extent it seeks a stay of the January 10, 2005, deposition of Dr. Keolcian.

**2. BMW's motion is granted in part and denied in part to the extent it seeks permission for BMW's counsel to meet ex parte with plaintiff's treating physicians and health care providers.**

**a. The parties are in disagreement over whether Michigan privacy law or HIPAA applies to BMW's request.**

BMW contends that "[n]o Michigan or federal court has held that HIPAA preempts Michigan's law on the waiver of the physician-patient privilege or precludes *ex parte* interviews of a plaintiff's treating physicians or other health care providers in the context of formal civil

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[2]Plaintiff's notice of taking the de bene esse deposition of Keoleian on January 10, 2005, is dated December 23, 2004 [the proof of service is dated December 27, 2004]. Mtn. Ex. C. Plaintiff contends that "[r]easonable notice was provided to [d]efendants as required by the applicable rules." Rsp. ¶ 5.

BMW notes that "[p]laintiff's counsel proceeded to meet *ex parte* with Dr. Keolcian, as he presumably has done on prior occasions, after BMW's counsel left Dr. Keoleian's office. BMW sits in the undesirable, and unfair, position of not being able to conduct discovery of this case under the same rules and circumstances as [p]laintiff's counsel." Mtn. at 3 ¶ 9. Citing *Domako v. Rowe*, 438 Mich. 347 (1991) and *Davis v. Dow Corning Corp.*, 209 Mich. App. 287 (1995), plaintiff argues that "Dr. Keoleian was within his rights to meet privately with [p]laintiff's counsel but at the same time to decline to do so with defense counsel." Rsp. at 4 ¶ 9.

litigation." Mtn. at 4-5 ¶ 12. According to BMW, "[c]ommon practice in Michigan is to allow defendants' counsel to conduct informal *ex parte* meetings with a plaintiff's treating physicians or health care providers[,]" and "BMW's counsel proceeded in good faith to attempt to meet informally with [p]laintiff's treaters pursuant to common practice in this state." Mtn. at 5 ¶ 12. BMW appears to contend that HIPAA does not create a privilege. Mtn. at 5 ¶ 13.[3] BMW argues that "HIPAA does not preclude Michigan's privilege law and the issue of informal discovery (including *ex parte* interviews of treating physicians in the scope of civil litigation proceedings) is not expressly addressed or prohibited under HIPAA." Mtn. at 5 ¶ 14. BMW claims that an informal discussion with an intended trial witness facilitates effective cross-examination and efficient use of the Court's time. Mtn. at 6 ¶ 16.[4]

Plaintiff suggests that "[d]efense counsel can obtain precisely the same information and prepare for cross-examination precisely the same way either by interviewing Dr. Keoleian or any treating physician in the presence of [p]laintiff's counsel, or by taking a discovery deposition." Rsp. at 6-7 ¶ 16. Plaintiff contends that "HIPAA supercedes Michigan law to the extent that Michigan law could have been construed to authorize *ex parte* interviews to take place without notice to [p]laintiff's counsel for the reasons set forth herein." Rsp. at 4-5 ¶ 10. Plaintiff claims that defense counsel's practice violates HIPAA. Rsp. at 5 ¶ 12. Plaintiff argues that "HIPAA

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[3]In support of this contention, defendant cites *Northwestern Memorial Hosp. v. Ashcroft*, 362 F.3d 923, 925-926 (7th Cir. 2004) ("[a]ll that 45 C.F.R. § 164.512(e) should be understood to do, therefore, is to create a procedure for obtaining authority to use medical records in litigation." "We do not think HIPAA is rightly understood as an Act of Congress that creates a privilege.").

[4]As BMW cites, "'such informal methods are to be encouraged, for they facilitate early evaluation and settlement of cases, with a resulting decrease in litigation costs, and represent further the wise application of judicial resources.'" *Domako*, 438 Mich. at 361, 475 N.W.2d at 36 (quoting *Trans-World Investments v. Drobny*, 554 P.2d 1148, 1152 (Alaska, 1976)).

expressly precludes secret *ex parte* interviews of the type attempted to be scheduled by defense counsel." Rsp. at 6 ¶ 14. Plaintiff also argues that "*ex parte* contacts between defense counsel and a plaintiff's treating physicians are governed by HIPAA, and attempts to schedule these meetings must be done in compliance with HIPAA's requirements." Rsp. at 13.

**b. HIPAA preempts state law and M.C.L. 600.2157 does not meet the preemption exception set forth in 42 U.S.C. § 1320d-7(a)(2).**

"[T]o the extent there is a difference between procedure under [Michigan] law and under HIPAA, the Court must decide which applies." *Crenshaw v. Mony Life Ins. Co.*, 318 F.Supp.2d 1015, 1028 (S. D. Ca. 2004). In so doing, "[t]he Court balances the federal interest against the state's interest." *Id.* "HIPAA's stated purpose of protecting a patient's right to the confidentiality of his or her individual medical information is a compelling federal interest." *Id.* "There is a less compelling state interest in permitting access to medical information where confidentiality has been waived." *Id.*

"HIPAA and the related provisions established in the Code of Federal Regulations expressly supercede any contrary provisions of state law except as provided in 42 U.S.C. § 1320d-7(a)(2)." *Law*, 307 F.Supp.2d at 708-709. 42 U.S.C. § 1320d-7 concerns "[e]ffect on State law". As one court has noted:

> Under [42 U.S.C. § 1320d-7(a)(2)], HIPAA and its Standards expressly do *not* preempt contrary state law, *id.* § 1320d-7(a)(2), *if* the state law "relates to the privacy of individually identifiable health information," *id.* § 1320d-7(a)(2)(B) (implemented at 45 C.F.R. § 160.203(b)), and is "more stringent" than HIPAA's requirements. Pub.L. 104-191, § 264(c)(2), 110 Stat.1936 (published in the Historical and Statutory Notes to 42 U.S.C. § 1320d-2; implemented at 45 C.F.R. § 160.203(b)).

*United States ex rel. Stewart v. Louisiana Clinic*, No. Civ.A. 99-1767, 2002 WL 31819130, *3 (E. D. La. 2002). *See also National Abortion Federation v. Ashcroft*, No. 03 Civ. 8695(RCC),

2004 WL 555701, *4 (S.D.N.Y. 2004) (citing HIPAA § 264(c)(2), 110 Stat.1936, 2033-2034) ("In HIPAA, Congress expressly provided for preemption of inconsistent state medical privacy laws except when those laws are more stringent than the standards that HIPAA gives HHS the authority to promulgate.").

In the instant motion, the issue is whether Michigan privacy law is more stringent than HIPAA. "When evaluating whether a state law is more stringent, courts should examine certain considerations--whether the state law: 1) prohibits or restricts a use or disclosure more so than the Privacy Rule; 2) permits greater rights of access to or amendment of information; 3) provides the individual with a greater amount of information; 4) narrows the scope or duration of an authorization or consent, expands the criteria necessary for an authorization or consent, or reduces the coercive effect of the circumstances surrounding an authorization or consent; or 5) requires longer or more detailed retention or reporting of disclosures." *Smith v. American Home Products Corp. Wyeth-Ayerst Pharmaceutical*, 372 N.J.Super. 105, 128, 855 A.2d 608, 622 (2003) (citing 45 C.F.R. § 160.202). Citing portions of 45 C.F.R. § 160.202, at least one court "views 'more stringent' to mean laws that afford patients more control over their medical records." *Law*, 307 F.Supp.2d at 709. For example, "[i]f a state law can force disclosure without a court order, or the patient's consent, it is not 'more stringent' than the HIPAA regulations." *Id.* at 711.

Michigan's physician-patient privilege and waiver of such privilege are codified at Mich. Comp. Laws § 600.2157. Section 600.2157 provides, in pertinent part, that "[i]f the patient brings an action against any defendant to recover for any personal injuries, or for any malpractice, and the patient produces a physician as a witness in the patient's own behalf who has

treated the patient for the injury or for any disease or condition for which the malpractice is alleged, the patient shall be considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease, or condition." Section 600.2157 "dictates the [o]nly manner in which the privilege can be [i]nvoluntarily waived by the patient." *Eberle v. Savon Food Stores, Inc.*, 30 Mich. App. 496, 500, 186 N.W.2d 837, 839 (1971). "[T]he privilege is deemed waived if the plaintiff brings an action to recover for personal injuries or for malpractice and [i]f the plaintiff shall produce any physician as a witness in his own behalf who has treated him for such injury." *Id.*[5]

In considering whether M.C.L. 600.2157 is more stringent than 45 C.F.R. § 164.512(e), I am persuaded by two pre-HIPAA Michigan cases which confirm that Section 600.2157 permits ex parte meetings with defense counsel. First, in *Domako v. Rowe*, 438 Mich. 347 (1991), the

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[5]Michigan Court Rule 2.314 concerns "discovery of medical information concerning party[.]" M.C.R. 2.314. As to scope, the rule provides that "[w]hen a mental or physical condition of a party is in controversy, medical information about the condition is subject to discovery under these rules to the extent that (a) the information is otherwise discoverable under MCR 2.302(B), and (b) the party does not assert that the information is subject to a valid privilege." M.C.R. 2.314(A)(1). It also provides that "[m]edical information subject to discovery includes, but is not limited to, medical records in the possession or control of a physician, hospital, or other custodian, and medical knowledge discoverable by deposition or interrogatories." M.C.R. 2.314(A)(2).

As to the assertion and waiver of privilege, M.C.R. 2.314 provides that "[a] party who has a valid privilege may assert the privilege and prevent discovery of medical information relating to his or her mental or physical condition. The privilege must be asserted in the party's written response to a request for production of documents under MCR 2.310, in answers to interrogatories under MCR 2.309(B), before or during the taking of a deposition, or by moving for a protective order under MCR 2.302(C). A privilege not timely asserted is waived in that action, but is not waived for the purposes of any other action." M.C.R. 2.314(B)(1).

As to the effect of an assertion of privilege, M.C.R. 2.314 provides that "[u]nless the court orders otherwise, if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable under MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition." M.C.R. 2.314(B)(2).

court considered "whether the physician-patient privilege was violated when defense counsel conducted an ex parte interview with the injured plaintiff's treating physician." *Domako*, 438 Mich. at 350. The Supreme Court affirmed the Court of Appeals' judgment which held that " the ex parte interview of the plaintiff's physician was proper because the physician-patient privilege had been waived by lack of timely assertion. After the privilege is waived in a malpractice action, each party is entitled to equal access to relevant information subject to the restrictions against 'annoyance, embarrassment, oppression, or undue burden or expense.'" *Id.* at 362 (citing MCR 2.302(C)).

Second, in *Davis v. Dow Corning Corporation*, 209 Mich. App. 287, 530 N.W.2d 178 (1995), the court affirmed the circuit court's entry of a protective order "concerning ex parte discovery interviews with plaintiffs' treating physicians in this silicone gel breast implant products liability litigation." *Davis*, 209 Mich. App. at 289; 530 N.W.2d at 179. The trial court had "ruled that both plaintiffs' and defendants' representatives were permitted to conduct ex parte interviews with plaintiffs' treating physicians, provided that they specifically advised the physicians that they were free to grant or decline an ex parte interview." *Davis*, 209 Mich. App. at 291; 530 N.W.2d at 180. The Court of Appeals of Michigan stated that "the trial court properly concluded that defendants were entitled to meet ex parte with plaintiffs' treating physicians." *Davis*, 209 Mich. App. at 293, 530 N.W.2d at 181.

On the other hand, HIPAA describes "[u]ses and disclosures for which an authorization or opportunity to agree or object is not required." 45 C.F.R. § 164.512. As to permitted disclosures for judicial and administrative proceedings, the regulation provides in pertinent part, that "[a] covered entity may disclose protected health information in the course of any judicial or

administrative proceeding: (I) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order[.]" 45 C.F.R. § 164.512(e)(1)(I). Furthermore,

> Section 164.512(e) allows disclosure of protected health information in response to a discovery request, even if unaccompanied by a court order, if reasonable efforts have been made to insure that individuals who are the subject of the protected health information requested are given notice of the request, or the covered entity receives satisfactory assurance that the requesting party has made reasonable efforts to secure a qualified protective order that provides that the parties (a) will not use or disclose the information for purposes other than the pending proceeding, and (b) will return the information (or destroy it) at the end of the litigation or proceeding. 45 C.F.R. § 164.512(e)(1)(ii), (v).

*Beard v. City of Chicago*, No. 03 C 3527, 2005 WL 66074, *3 (N.D.Ill. Jan. 10, 2005).

I conclude that HIPAA does not permit informal discovery. With regard to HIPAA, at least one court has stated that "[i]nformal discovery of protected health information is now prohibited unless the patient consents." *Law*, 307 F.Supp.2d at 711.[6] Another court has stated

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[6]In *Law v. Zuckerman*, 307 F.Supp.2d 705 (D. Md. 2004), the court considered two questions: "The first was whether Defendant's ex parte pre-trial contacts with Plaintiff's treating physician[] were a violation of HIPAA. Second, if those contacts were a violation of HIPAA, whether the remedy was to preclude Defendant from having other ex parte communications with [that treating physician]." *Law*, 307 F. Supp.2d at 707. The Court found that "a violation of HIPAA did occur but the remedy requested [wa]s not appropriate." *Id. See also Crenshaw v. Mony Life Ins. Co.*, 318 F.Supp.2d 1015, 1028 (S. D. Ca. 2004).

In denying plaintiff's motion to preclude Pinckert from discussing plaintiff's treatment with defense counsel, the court stated that (A) "[t]he ex parte contacts between Defendant and Dr. Pinckert are governed by HIPAA not Maryland law[,]" (B) "[i]nformal discovery of protected health information is now prohibited unless the patient consents[,]" and (C) "[t]he imposition of sanctions is not appropriate." *Id.* at 708-713. In pertinent part, the court stated:

> HIPAA outlines the steps to follow in order to obtain protected health information during a judicial proceeding in 45 C.F.R. § 164.512(e). There are three ways. First, counsel may obtain a court order which allows the health care provider to disclose "only the protected health information expressly authorized by such order." 45 C.F.R. § 164.512(e)(1)(I). In the absence of a court order, §§ 164.512(e)(1)(ii)(A) and (B) provide two additional methods available when used in conjunction with

that "HIPAA does not authorize ex parte contacts with healthcare providers. In this case, where no protective order safeguarding Crenshaw's privacy is in place, HIPAA's disclosure procedures apply. Only formal discovery requests appear to satisfy the requirements of § 164.512(e). As a result, defense counsel's pretrial contacts with Dr. Harris and the doctor's disclosures were in violation of HIPAA." *Crenshaw*, 318 F.Supp.2d at 1029.[7] I find these cases persuasive for the theory that ex parte meetings with defense counsel are not permitted by HIPAA.

In its reply, BMW argues that "HIPAA does not supersede [the] Federal Rules of Civil Procedure." Rpl. at 3-5. Defendants claim that "[n]umerous cases have held that the conduct of discovery and the introduction of evidence in federal courts cannot be restricted by federal regulations[,]"[8] and "there is nothing in the HIPAA statute to indicate that Congress intended the

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more traditional means of discovery.

*Law*, 307 F.Supp.2d at 711.

[7]In *Crenshaw v. Mony Life Ins. Co.*, 318 F.Supp.2d 1015 (S. D. Ca. 2004), plaintiff contended that a doctor (one who apparently had conducted a consultative examination) violated HIPAA and that "counsel's failure to give notice of his ex parte contacts with the doctor assisted the doctor in committing a violation." *Crenshaw*, 318 F. Supp. 2d at 1027. The court stated that "Plaintiff has shown that Defendant violated HIPAA by contacting Dr. Harris ex parte in the absence of a qualified protective order and without a formal discovery request. The relief sought by Plaintiff is extreme and not warranted in this case. Lesser sanctions than those requested by Crenshaw are appropriate. Plaintiff's Motion to Disqualify Peter Mason and Todd Sorrell as Defendant's Attorneys is DENIED on the condition that Dr. Harris be made available for deposition as outlined above." *Crenshaw v. Mony Life Ins. Co.*, 318 F.Supp.2d 1015, 1030 (S. D. Ca. 2004).

[8]In support of this statement, BMW cites *In re Bankers Trust Co.*, 61 F.3d 465, 466, 469-470 (6th Cir. 1995); *Resolution Trust Corp. v. Deloitte & Touche*, 145 F.R.D. 108 (D. Colo. 1992) and *Merchants Nat'l Bank & Trust Co. of Fargo v. United States*, 41 F.R.D. 266 (D.N.D. 1966).

However, I conclude that *In re Bankers Trust Co.*, is distinguishable. In *Bankers Trust*, the Court concluded that "Congress did not empower the Federal Reserve to prescribe regulations that direct a party to deliberately disobey a court order, subpoena, or other judicial mechanism requiring the production of information." *Bankers Trust*, 61 F.3d at 470. It further stated that "[t]o allow a federal regulation issued by an agency to effectively override the application of the Federal Rules

regulations to supersede the Federal Rules of Civil Procedure or the Federal Rules of Evidence." According to BMW, "[t]his [C]ourt's authority to ensure defendant a fair trial by permitting counsel's interviews with witnesses that [p]laintiff intends to call at trial remains intact[,]" and the Federal Rules of Civil Procedure and the Federal Rules of Evidence "permit counsel's interview with [p]laintiff's treating physicians." Rpl. at 4-5. However, in a federal question case, at least one court has stated:

> "HIPAA and the regulations promulgated thereunder, not Federal Rule of Evidence 501, control the protections provided to patient medical records held by hospitals." *Nat'l Abortion Fed'n*, 2004 WL 292079, at *5. This conclusion is bolstered by the fact that the regulations include provisions specifically devoted to disclosure of patient health information during judicial proceedings. *See* 45 C.F.R. § 160.512(e). HIPAA, through its implementing regulations, speaks directly to the privilege asserted in this case.
> The privacy provisions promulgated under HIPAA therefore control the enforceability of the subpoena.

*National Abortion Federation v. Ashcroft*, 2004 WL 555701, *6 (S.D.N.Y. 2004).

Therefore, HIPAA preempts state law and M.C.L. 600.2157 does not meet the preemption exception set forth in 42 U.S.C. § 1320d-7(a)(2). *See also* HIPAA § 264(c)(2).[9]

**c. BMW may satisfy HIPAA by obtaining an authorization that complies with HIPAA regulation 45 C.F.R. § 164.508.**

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of Civil Procedure and, in essence, divest a court of jurisdiction over discovery, the enabling statute must be more specific than a general grant of authority as found here." *Id.* (citing *Resolution Trust Corp.*, 145 F.R.D. at 11). Comparatively, HIPAA provides for enforcement by the State and by the Secretary. 42 U.S.C. § 300gg-22(a) and (b).

[9]*But see Smith*, 372 N.J.Super. at 128, 130; 855 A.2d at 622-623. In its determination of whether New Jersey law is more stringent than HIPAA, the court stated that "[n]owhere in HIPAA does the issue of *ex parte* interviews with treating physicians, as an informal discovery device, come into view." *Id.*, 372 N.J.Super. at 128, 855 A.2d at 622. The court reasoned that "[b]ecause informal discovery is not expressly addressed under HIPAA, the courts should be governed by state law[.]" *Id.*, 372 N.J.Super. at 130, 855 A.2d at 623.

It is clear that HIPAA "regulates the methods by which a physician may release a patient's health information, including 'oral' medical records." *Law*, 307 F.Supp.2d at 708. *See also Crenshaw v. Mony Life Ins. Co.*, 318 F.Supp.2d 1015, 1028 (S. D. Ca. 2004). Given my conclusion that HIPAA preempts state law and that M.C.L. 600.2157 does not meet the preemption exception set forth in 42 U.S.C. § 1320d-7(a)(2), BMW's counsel's contacts with plaintiff's treating physicians must comply with HIPAA.

BMW may satisfy HIPAA restrictions by obtaining an authorization that complies with HIPAA regulation 45 C.F.R. § 164.508, which describes certain "[u]ses and disclosures for which an authorization is required." 45 C.F.R. § 164.508. In part, the regulation provides that "[e]xcept as otherwise permitted or required by this subchapter, a covered entity may not use or disclose protected health information without an authorization that is valid under this section. When a covered entity obtains or receives a valid authorization for its use or disclosure of protected health information, such use or disclosure must be consistent with such authorization."

45 C.F.R. § 164.508(a)(1). Implementation of a valid authorization includes certain core elements[10] and required statements[11]. 45 C.F.R. § 164.508(c)(1)-(2).

Plaintiff claims that "[n]either of the releases attached by [d]efendant compl[ies] with HIPAA." Rsp. at 12. Plaintiff "denies that the release authorized secret attempts to schedule ex parte interviews of Mr. Croskey's medical providers." Plaintiff contends that the February 2004

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[10](1) Core elements. A valid authorization under this section must contain at least the following elements:
(i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.
(ii) The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure.
(iii) The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure.
(iv) A description of each purpose of the requested use or disclosure.[]
(v) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure.[]
(vi) Signature of the individual and date.[]
45 C.F.R. § 164.508(c)(1).

[11](2) Required statements. In addition to the core elements, the authorization must contain statements adequate to place the individual on notice of all of the following:
(i) The individual's right to revoke the authorization in writing, and either:
(A) The exceptions to the right to revoke and a description of how the individual may revoke the authorization; or
(B) To the extent that the information in paragraph (c)(2)(i)(A) of this section is included in the notice required by § 164.520, a reference to the covered entity's notice.
(ii) The ability or inability to condition treatment, payment, enrollment or eligibility for benefits on the authorization, by stating either:
(A) The covered entity may not condition treatment, payment, enrollment or eligibility for benefits on whether the individual signs the authorization when the prohibition on conditioning of authorizations in paragraph (b)(4) of this section applies; or
(B) The consequences to the individual of a refusal to sign the authorization when, in accordance with paragraph (b)(4) of this section, the covered entity can condition treatment, enrollment in the health plan, or eligibility for benefits on failure to obtain such authorization.
(iii) The potential for information disclosed pursuant to the authorization to be subject to redisclosure by the recipient and no longer be protected by this subpart.
45 C.F.R. § 164.508(c)(2).

release "only applied to medical records, not oral communications[,]" and "mistakenly authorized the records to be directly sent to Bowman and Brooke or their agent."[12] He claims that the August 2004 release superceded and revoked defense counsel's firm's right to directly obtain the records and "was provided with the explicit understanding that the releases did not authorize anything other than the copying of [p]laintiff's records by an independent service." Plaintiff claims that "[n]either release authorized [d]efendants' attempt to engage in *ex parte* communications with [p]laintiff's treating physicians[,]" and labels certain of defense counsel's actions as sanctionable and unethical. Rsp. at 1-3 ¶ 3.

Plaintiff argues that "HIPAA requires [d]efense counsel to have an appropriate release before a provider can discuss [p]laintiff's Protected Health Information (PHI) - a provision [d]efense counsel violated." Rsp. at 5 ¶ 10. Plaintiff claims that defense counsel has "secretly attempted to schedule *ex parte* meetings with at least three of [p]laintiff's treating physicians[,]" - in violation of HIPAA. Rsp. at 8.

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[12]On February 23, 2004, plaintiff signed a HIPAA Privacy Authorization for William Beaumont Hospital - Royal Oak. The authorization provided that the requested information be released for copying to defense counsel's firm or its agent (Record Copy Services). Mtn. Ex. A.

In a July 28, 2004, letter to defense counsel, plaintiff's counsel stated, "If by some oversight we signed the authorization which permitted your firm or BMW to obtain records directly from any source, those authorizations are hereby revoked and should not be used by you or your client again." (Doc. Ent. 119, Ex. 10).

On August 31, 2004, plaintiff signed a medical and rehabilitation authorization requesting that the information sought be supplied to Record Copy Services or Record Deposition Service. Mtn. Ex. B.

In a September 22, 2004, letter to defense counsel, plaintiff's counsel stated: "Please note that [the medical and rehabilitation authorization and authorization for education records addressed to John Claya] are only authorizing Record Copy Services or Records Deposition Service to inspect and make and obtain for Bowman and Brooke the records you are requesting." Rsp. Ex. 3.

Furthermore, plaintiff argues that "[f]ederal law requires defense counsel to . . . disclose *ex parte* meetings before they occur." Rsp. at 10-14. Even though, as plaintiff notes, a New Jersey court concluded that New Jersey law permits ex parte interviews, "HIPAA requires that a reasonable notice provision and an opportunity for the patient to object to *ex parte* contacts were necessary to bring a New Jersey law into compliance with HIPAA[.]" Rsp. at 13. In *Smith*, the Court granted in part and denied in part defendants' [phenylpropanolamine manufacturers'] motion "compelling *ex parte* physician interviews and seeking judicial approval of a revised medical authorization." *Smith*, 372 N.J.Super. at 109-110, 855 A.2d at 610-611. The court noted that "[t]he New Jersey Supreme Court permits defendants to conduct these *ex parte* interviews of a plaintiff's health care provider so long as the defendant complies with specific patient authorization requirements." *Smith*, 372 N.J.Super. 105, 112, 855 A.2d 608, 612 (2003) (citing *Stempler v. Speidell*, 100 N.J. 368, 373-382, 495 A.2d 857, 859-864 (1985)).[13] The court examined "the narrow issue of whether HIPAA preempts the informal discovery techniques[,]" and decided that it did not. *Smith*, 372 N.J.Super. at 126, 855 A.2d at 621. In *Smith*, the court noted that "[w]hether a use or disclosure of medical information will be permitted under the HIPAA and the Privacy Rule depends on the person accessing the information and the patient who holds the original privilege." *Smith*, 372 N.J.Super. at 131, 855 A.2d at 623-624. In the New Jersey PPA cases, the court considered not only preemption, but also authorization compliance and merit of use. *Id.*, 372 N.J.Super. at 131-132, 855 A.2d at 623-624.

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[13]"Those requirements are that defense counsel must: 'provide plaintiff's counsel with reasonable notice of the time and place of the proposed interview; provide the physician with a description of the anticipated scope of the interview; and communicate with 'unmistakable clarity' the fact that the physician's participation in an ex parte interview is voluntary.'" *Smith*, 372 N.J.Super. at 113, 855 A.2d at 612 (citing *Stempler*, 100 N.J. at 382, 495 A.2d at 864).

As plaintiff also points out, the Michigan state courts "have been presented with this issue." Rsp. at 13. In *Hitson v. McLaughlin*, Case No. CO3-OO0384-NH (Kalamazoo County Circuit Court Jan. 23, 2004), Judge Lamb did not "compel plaintiff to sign authorizations permitting oral communications by defense counsel with plaintiff's treating physicians[.]" Rsp. Ex. 7. In *Rogers v. Three Rivers Area Hospital*, Case No. 03-226-NH (St. Joseph County Circuit Court Nov. 5, 2003), Judge Noecker denied defendants' motion to require plaintiff to sign medical authorizations. Rsp. Ex. 8. Plaintiff argues that, "[i]n addition to a[n] HIPAA compliant release, [d]efense counsel is now required to inform plaintiff's counsel of any attempt to have an *ex parte* meeting with [p]laintiff's treating physicians[,]" and "[t]hey are further required to inform the treating physicians that notice has been given to [p]laintiff's counsel." Rsp. at 14.

In reply, BMW argues that 45 C.F.R. § 164.508(a) permits "defense counsel's *ex parte* communication with [p]laintiff's treating physicians without notice to [p]laintiff's counsel." BMW argues that this provision permits "such communications with an authorization." BMW contends that "an authorization signed by [p]laintiff permits release of all medical information[,]" and "the physicians may rely on [p]laintiff's authorization." Rpl. at 1. BMW claims it relied upon plaintiff's February 23, 2004, authorization in its effort to speak with Dr. Keoleian." and did not violate HIPAA because plaintiff authorized the release of his medical information. Rpl. at 1-2.

Compliance with 45 C.F.R. § 164.508(a) is one way by which BMW might conduct its contact with plaintiff's treating physicians. Although this regulation does not appear to require notice to plaintiff's counsel, it is difficult to imagine BMW's acquisition of a compliant authorization except through plaintiff's counsel. Such an interpretation is consistent with the

aforementioned distaste for informal discovery under HIPAA. Furthermore, plaintiff is correct that "[p]ost-HIPAA, at least two Michigan courts have ordered [d]efendants to include language in their medical authorizations informing physicians that they are not required to engage in *ex parte* interviews with defense counsel and that refusing to do so would not violate either Federal or Michigan law." Rsp. at 15.[14] Plaintiff contends that "Michigan law does not require treating physicians to engage in *ex parte* communications with defense counsel." Rsp. at 15-16. According to plaintiff, "Dr. Keoleian invited [p]laintiff's counsel to the *ex parte* meeting[;]" Dr. Keoleian "was never informed by defense counsel that he did not have to engage in that meeting[;]" and "[p]laintiff's counsel did not instruct Dr. Keoleian to avoid or cancel the meeting[.]" Rsp. at 16.

Therefore, in order to conduct an ex parte interview with plaintiff's treating physician in reliance on 45 C.F.R. § 164.508, BMW needs not only a compliant authorization, but also notice to plaintiff's counsel of the desire to conduct an ex parte meeting with plaintiff's treating physician and notice to the treating physician that such a meeting is not required. These notices

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[14]In *Lance v. Grassl*, Case No. 03-00-0287 NH, (Kalamazoo County Circuit Court Jan. 8, 2004), Judge Schma denied defendants' motion for summary disposition but provided for an authorization for ex-parte communication with decedent's treating healthcare providers. The language of the authorization stated: "I am authorizing, but not requesting, that you meet with [defense attorney] to discuss the care and treatment of the above-named patient. Please be advised that this authorization does not require you to meet with [defense attorney]. You may decline such a meeting without being in violation of any Michigan or Federal law." Rsp. Ex. 9.

In *Phoenix Broadwood-Volkhardt v. St. Mary's Hospital, Grand Rapids*, Case No. OJ-00299-NH, (Kent County Circuit Court July 3, 2003), Judge Sullivan denied defendant's motion for summary disposition and granted defendant's motion to compel. In so doing, Judge Sullivan required plaintiff "to provide medical authorizations to the [d]efendant[], expressly [permitting] oral communications with health care providers." Attached to the order, was a form "authorization for release of health information", which stated in pertinent part: "This authorization also permits (but does not require) oral communications regarding my medical condition between agents of [*****] and the Releasing Party [.]" Rsp. Ex. 9.

to plaintiff's counsel and the treating physicians are required in light of HIPAA's distaste for informal discovery. If plaintiff permits an ex parte meeting and if the treating physician is willing to conduct an ex parte meeting with defense counsel,[15] plaintiff may be deemed to have waived his rights under HIPAA and the ex parte meeting may be conducted. Rsp. at 8.

**d. In the absence of an authorization, BMW may satisfy HIPAA by complying with HIPAA regulation 45 C.F.R. § 164.512(e).**

BMW may also satisfy HIPAA by complying with HIPAA regulation 45 C.F.R. § 164.512(e)(1). This would occur "[i]n response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order[.]" 45 § 164.512(e)(1)(I). It might also occur "[i]n response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if: (A) The covered entity receives satisfactory assurance . . . from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or (B) "The covered entity receives satisfactory assurance . . . from the party seeking the information that reasonable efforts have been made by

[15]According to plaintiff, each doctor has indicated that he does not wish to have an ex parte meeting with defense counsel regarding plaintiff's condition. (1) In a January 6, 2005, letter to plaintiff's counsel's office, Charles M. Kcolcian, M.D., stated that he would prefer to have plaintiff's counsel present at any future meetings. Rsp. Ex. 4. (2) At the January 7, 2005, deposition of Robert Alan Krasnick, M.D., he testified that "I think if a meeting's going to be held with Mr. Gorcyca, all parties should be present." Rsp. Ex. 5. (3) In a January 5, 2005, letter to plaintiff's counsel, Steven Frank, Ph.D. (Licensed Psychologist) stated that he would "not attend any private meeting with a [B]MW attorney unless it is authorized in advance and in writing by [plaintiff's counsel]." Rsp. Ex. 6.

such party to secure a qualified protective order that meets the requirements of paragraph (e(1)(V) of this section." 45 C.F.R. § 164.512(e)(1)(ii).

I agree with BMW that 45 C.F.R. § 164.512(e)(1)(ii)(A) [notice] and 45 C.F.R. § 164.512(e)(1)(ii)(B) [protective order] are alternate provisions. Rpl. at 2-3. Therefore, there are three ways in which BMW might comply with 45 C.F.R. § 164.512(e)(1): (1) obtaining a court order, as set forth in 45 C.F.R. § 164.512(e)(1)(I);[16] (2) sending a subpoena or discovery request where plaintiff has been given notice of the request, as set forth in 45 C.F.R. § 164.512(e)(1)(ii)(A); or (3) sending a subpoena or discovery request where reasonable effort has been made to obtain a qualified protective order as set forth in 45 C.F.R. § 164.512(e)(1)(ii)(B).

BMW states that it "will stipulate to a protective order, limiting the scope of [its] discussion to those matters that were placed at issue by [p]laintiff's lawsuit and prohibits the use or disclosure of the information outside this litigation[,]" Mtn. at 6 ¶ 17, and I will construe this statement as a request for protective order as set forth in 45 C.F.R. § 164.512(e)(1)(ii)(B).

BMW argues that 45 C.F.R. 164.512(e)(1)(ii)(B) permits "defense counsel's *ex parte* communication with [p]laintiff's treating physicians without notice to [p]laintiff's counsel." Rpl. at 1-2. BMW contends that "this [C]ourt need only issue a protective order regarding contact between [p]laintiff's treaters and counsel." Rpl. at 2. BMW contends that compliance with this regulation "requires a protective order from this [C]ourt 1.) prohibiting disclosure of the health information for any purpose other than the litigation and 2.) requiring that copies of the information be destroyed at the conclusion of this proceeding." If the Court determines that

[16]Plaintiff claims that BMW did not obtain a court order for the disclosure of protected health information in a judicial proceeding as required by 45 C.F.R. § 164.512(e)(1)(i). Rsp. at 12.

HIPAA applies to defense counsel's contact with plaintiff's medical providers, then BMW requests the entry of a protective order giving plaintiff's medical providers permission to release medical records and "to discuss in private with [defense] counsel their anticipated testimony in compliance with HIPAA." BMW contends that such an order is appropriate, as plaintiff's lawsuit puts his medical condition at issue. BMW contends that "[i]f the treating physicians are willing to discuss with BMW's counsel[], their anticipated testimony, they should be permitted to do so without going through the time and expense of a deposition." Rpl. at 3.

I agree with plaintiff's statement that "[w]hile a protective order is necessary to reflect HIPAA's requirements, the fundamental point of this motion is that [d]efendants must give notice to [p]laintiff's counsel before conducting *ex parte* meetings, and further must specifically advise each treating physician that they are not obligated to meet with defense counsel under either Michigan or Federal law." Rsp. at 7 ¶ 17. Therefore, in order to conduct an ex parte interview with plaintiff's treating physician in reliance on 45 C.F.R. § 164.512(e), BMW needs not only to comply with 45 C.F.R. § 164.512(e)(1), but also to give notice to plaintiff's counsel of the desire to conduct an ex parte meeting with plaintiff's treating physician and to give notice to the treating physician that such a meeting is not required. These notices to plaintiff's counsel and the treating physicians are required in light of HIPAA's distaste for informal discovery. If plaintiff permits an ex parte meeting and if the treating physician is willing to conduct an ex parte meeting with defense counsel, plaintiff may be deemed to have waived his rights under HIPAA and the ex parte meeting may be conducted.

To the extent I have construed BMW's motion as a request for a 45 C.F.R. § 164.512(e)(1)(ii)(B) protective order, BMW may submit a proposed order to my chambers.

However, BMW is cautioned that, as discussed above, there will be additional prerequisites to an ex parte conversation with plaintiff's treating physician, including (1) sending a subpoena or discovery request where reasonable effort has been made to obtain a qualified protective order as set forth in 45 C.F.R. § 164.512(e)(1)(ii)(B); (2) giving notice to plaintiff's counsel of the desire to conduct an ex parte meeting with plaintiff's treating physician; and (3) giving notice to the treating physician that such a meeting is not required.

**e. Sanctions against defense counsel are limited to its conduct in the case at bar. Defense counsel must comply with my foregoing conclusions regarding the application of HIPAA and any waiver by plaintiff of such requirements.**

42 U.S.C. § 1320d-5 sets forth the "[g]eneral penalty for failure to comply with requirements and standards". However, as the *Crenshaw* court noted, "[t]he Act does not address how to treat a HIPAA violation that occurs during discovery or trial." *Crenshaw*, 318 F.Supp.2d at 1030. *See also Logan v. Department of Veterans Affairs*, ___F.Supp.2d___, No. 02-701 (RJL), 2004 WL 3168183, *4 (D.D.C. 2004) (where plaintiff alleged, among other claims, a violation of HIPAA, the Court stated "the law specifically indicates that the Secretary of HHS shall pursue the action against an alleged offender, not a private individual.").

In regard to assessing sanctions for HIPAA violations during discovery, I find *Law* and *Crenshaw* instructive. In *Law* the court stated: "Since HIPAA does not include any reference to how a court should treat such a violation during discovery or at trial, the type of remedy to be applied is within the discretion of the Court under Fed. R. Civ. P. 37." *Law*, 307 F.Supp.2d at 712. The Court stated that the requested remedy of "precluding [d]efendant's counsel from speaking further with Dr. Pinckert about [p]laintiff's treatment is not appropriate here[,]" and concluded that a previously entered order "effectively remedied any potential violation." *Id.* at

712-713. In *Crenshaw*, the court stated that "[a] sanction short of disqualification is appropriate[;]" instructed that "defense counsel is not to have any further ex parte communications with Dr. Harris prior to the deposition, unless Plaintiff chooses to forego the deposition[,]" and denied plaintiff's motion for disqualification of defense counsel "on the condition that Dr. Harris be made available for deposition as outlined above." *Crenshaw*, 318 F.Supp.2d at 1030.

As it related to Dr. Keoleian's deposition, BMW was concerned that plaintiff would be permitted "to take Dr. Keoleian's trial testimony before BMW ha[d] had an opportunity to discuss with Dr. Keoleian the nature of his testimony." Mtn. at 6 ¶ 18. BMW seeks entry of a court order "permitting [its] counsel to conduct *ex parte* discussions with [p]laintiff's treating physicians and health care providers in preparation for trial in this matter[.]" Rpl. at 5.[17]

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[17]In a portion of BMW's reply, BMW argues that "[a]t least some of plaintiff's physicians are willing to speak privately with BMW's counsel." Rpl. at 5. BMW seeks "in addition to the relief requested in its original motion, that this Court strike the January 28, 2005 deposition of Dr. Spohn (purportedly one of plaintiff's treating physicians) and require [p]laintiff to pay BMW's costs and attorneys fees to prepare for and attend the deposition of Dr. Spohn." Rpl. at 5.

On February 2, 2005, plaintiff filed an objection to new issues raised in defendant's reply brief. (Doc. Ent. 118). Plaintiff "objects to the inclusion of any issues relating to Dr. Spohn's deposition in [BMW's] [r]eply [b]rief, including its request to strike the deposition and for costs and attorney fees[,]" as they are frivolous and improper. Obj. at 2. Plaintiff has filed the January 25, 2005, letter of Dr. Spohn, which states that he "would be pleased to discuss and review the Willie Croskey case with any and all parties involved in this litigation, providing the legal representatives of my patient are present at that time." (Doc. Ent. 119, Ex. 11). Plaintiff has also filed excerpts of Dr. Spohn's January 28, 2005, deposition wherein plaintiff's counsel and defense counsel questioned Dr. Spohn about meeting/speaking with defense counsel. (Doc. Ent. 119, Ex. 12).

BMW's request for relief is denied to the extent it sought the additional relief of an order "striking all de bene esse depositions of [p]laintiff's treating physicians conducted prior to this order[.]" Rpl. at 5. This portion of BMW's request for relief is denied, because, as plaintiff notes, the "request for costs and attorney fees relating to the deposition of Dr. Spohn" was not presented in the original motion. (Doc. Ent. 118 at 2). Therefore, plaintiff did not have an opportunity to respond.

Plaintiff requests a Court order requiring defense counsel to "refrain from further violations of Federal law[.]" Rsp. at 5 ¶ 12. He also seeks entry of a court order "[p]rohibiting defense counsel from scheduling *ex parte* meetings with Drs. Keoleian, Krasnick or Frank;" "requiring defense counsel to immediately disclose whether it has scheduled or held any *ex parte* meetings with any of [p]laintiff's other treating physicians, so that additional relief if necessary, can be obtained;" "[o]rder[ing] defense counsel to provide notice to [p]laintiff's counsel before scheduling any other *ex parte* interviews of [p]laintiff's treating physicians;" and "[r]equir[ing] defense counsel to specifically advise any treating physicians of [p]laintiff that they are free to decline defense counsel's request for an *ex parte* interview[.]" Rsp. at 16-17. I decline to enter an order prohibiting defense counsel from scheduling ex parte meetings with Drs. Keoleian, Krasnick or Frank, as BMW might do so by complying with my foregoing conclusions. The remainder of these requests are granted, as they are consistent with my foregoing conclusions regarding the application of HIPAA and any waiver by plaintiff of such requirements.

Plaintiff's counsel's request for an order requiring "defense counsel to immediately notify any litigant whose treating physician defense counsel has spoken to *ex parte*, and without notice to the plaintiff or their counsel, of the meeting and of the order entered by this Court[,]" Rsp. at 16-17, Rsp. at 5 ¶ 12, is denied. In support of this request, plaintiff cites *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 512 (6th Cir. 2002) ("the Supreme Court in *Chambers* emphasized that the inherent authority of the Court is an independent basis for sanctioning bad faith conduct in litigation."). Rsp. at 5-6 ¶ 12. BMW maintains that its "practice is to rely on executed Affidavits to discuss a plaintiff's medical information with treaters. There is no basis for this court to instruct defense

counsel to notify all counsel in all of his other cases where he relied on executed authorizations." Rpl. at 1 n.1. However, I am not convinced that what occurred in this case warrants an exercise of the Court's inherent authority to sanction. My ruling is limited to the issues raised in the instant motion which concern the case at bar.

## II. ORDER

In accordance with the foregoing, BMW's emergency motion to stay the January 10, 2005 *de bene esse* deposition of Dr. Charles Keolcian and permit BMW's counsel to meet *ex parte* with plaintiff's treating physicians is DEEMED MOOT IN PART, GRANTED IN PART and DENIED IN PART.

IT IS SO ORDERED.

The attention of the parties is drawn to Fed. R. Civ. P. 72(a), which provides a period of ten days from the date of receipt of a copy of this Order within which to file objections for consideration by the District Judge under 28 U.S.C. 636(b)(1).

Paul J. Komives

PAUL J. KOMIVES
UNITED STATES MAGISTRATE JUDGE

Dated: Feb. 14, 2005